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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 12, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE, PETITION FOR INTERVENTION, AND MOTION FOR INJUNCTION AND APPOINTMENT OF RECEIVER

A motion for leave to intervene, a petition for intervention, and a motion for injunction and appointment of receiver were filed in this Court on April 19, 1948, purportedly[1] on behalf of twenty-one bands of Indians of California and two individual Indians, "jointly and severally * * * on behalf of themselves and other bands of In-

[1] None of the documents filed alleges that counsel has been authorized to represent these Indians in accordance with the requirements of 25 U. S. C. 81 and 476 (cf. *Tlingit and Haida Nations* v. *United States*, 102 Ct. Cls. 209); and we are informed by the Department of the Interior that no such authority under those provisions in fact existed either on the day of filing or on the day that this memorandum is being sent to the printer.

dians and individual California Indians similarly situated" (Motion, p. 3). The objectives sought by petitioners, as set forth in these documents, are (1) permission to intervene as parties defendant in this proceeding "with full right to participate as parties in the hearing and disposition of the said cause" (Motion, pp. 3–4); (2) an injunction prohibiting the United States, its officers and agents, and all persons claiming thereunder, from making grants or conveyances affecting any of the lands involved in this proceeding, and from permitting the development of minerals in such lands (Motion, pp. 13–14); (3) a similar injunction prohibiting the State of California, its officers, agents and permittees, and all persons purporting to act under the mineral laws of the United States, and all other persons, from further trespassing upon the lands in question in connection with the development of oil and gas, and from removing therefrom any fixtures or other property used in such development (Motion, p. 14); and (4) the appointment of a receiver or receivers to take charge of the lands in question, together with the oil and gas therein, and the improvements and fixtures thereon, with authority to conserve and operate the same under the supervision of the Court (Motion, pp. 14–15).

It would appear that the claims which petitioners seek to assert in this proceeding are predicated upon an alleged right of aboriginal occupancy and ownership and subsequent confirmation

of Indian titles by the Spanish Government, the Mexican Government and the United States (Motion, p. 17). It is asserted in the documents that "the petitioners are still the owners in their own right, and free from any lawful claims of the United States of America or the State of California" to substantial portions of the lands involved in this proceeding (Motion, p. 11), and that the rights of the petitioners are "paramount to that of both the United States of America and the State of California" (Motion, pp. 12, 15–16).

The United States opposes the admission of petitioners as parties to this cause, which is an original suit brought in this Court by the United States against the State of California to obtain an adjudication of the respective rights of the sovereign parties in and to the three-mile belt of the Pacific Ocean adjacent to the coast of California.

A. *Jurisdiction.*—Petitioners state that they are seeking to intervene in this proceeding as parties defendant (Motion, pp. 3, 12). It is readily apparent from the documents filed with this Court, however, that petitioners are actually seeking to intervene in order to assert claims adverse to those of both the sovereign parties presently before the Court. Neither of the sovereign parties has consented to the assertion of such claims.

The original jurisdiction conferred on this Court by Article III "depends solely on the character of the parties." *Louisiana* v. *Texas,* 176

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The original jurisdiction conferred on this Court by Article III "depends solely on the character of the parties." *Louisiana* v. *Texas,* 176

U. S. 1, 16. Thus, even if the United States had consented to the assertion of petitioners' claims, this Court could not entertain those claims in a separate original proceeding, *United States* v. *Coe,* 155 U. S. 76, 82. See *United States* v. *West Virginia,* 295 U. S. 463, 470. Cf. *Williams* v. *United States,* 289 U. S. 553, 577. Likewise, the fact that the State of California would be a party would not vest this Court with original jurisdiction to consider a separate suit asserting petitioners' claims against the State. If petitioners are citizens of the State of California, this Court would have no original jurisdiction because the suit would be one in which a State and its own citizens were adverse parties. *Pennsylvania* v. *Quicksilver Company,* 10 Wall. 553, 556; *California* v. *Southern Pacific Co.,* 157 U. S. 229, 261–262; *Duhne* v. *New Jersey,* 251 U. S. 311, 313–314. And if petitioners are citizens of another State, a separate original proceeding against the State would be barred by the Eleventh Amendment. If the petitioners are citizens of no State, such a suit would likewise be precluded. Cf. *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16–18; *Monaco* v. *Mississippi,* 292 U. S. 313, 328–330.

It would seem clear from the foregoing that this Court would have no original jurisdiction to consider the claims of petitioners if those claims were attempted to be asserted in separate suits brought against the respective sovereign parties now before the Court. And since "consent alone

gives jurisdiction to adjudge against a sovereign" even when relief against the sovereign is sought not by separate suit but in a collateral stage of an existing cause (*United States* v. *U. S. Fidelity Co.*, 309 U. S. 506, 514), the power of this Court to grant an application for leave to present these claims is extremely doubtful. Cf. *Florida* v. *Georgia*, 17 How. 478.

The circumstances which prompted the Court to permit the intervention of certain individual parties in *Oklahoma* v. *Texas*, 258 U. S. 574, cited by petitioners (Motion, p. 6), were quite different from those existing in this proceeding. In *Oklahoma* v. *Texas*, the parties intervening were grantees or licensees of one of the principal parties to the suit (see 258 U. S. at 582), and the claims asserted by each of the intervening parties were in common with those of at least one of the principal parties. The Court permitted intervention in order that the claims of these parties holding under the original parties could be dealt with as ancillary to the main issues before the Court. See 258 U. S. at 580–581. In the present instance, petitioners do not suggest that they occupy the position of claimants under either of the principal parties or that they assert a right in common with either of the parties. On the contrary, it is alleged that the rights of petitioners are free from, and paramount to, those of either the United States or the State of California. Accordingly it is believed that the action of the

Court in permitting intervention in the case of *Oklahoma* v. *Texas* constitutes no precedent for the granting of petitioners' request in this proceeding.

B. *The nature of the petitioners' claims.*—The petitioners' claim to the property involved in this suit rests solely on an alleged aboriginal occupancy. But the petitioners themselves describe the nature of that so-called aboriginal occupancy as follows (Motion, p. 8):

> * * * predecessors of petitioners occupied the coastal lands, and in boats plied between the mainland of California and the islands for the purpose of catching seals, the skins of which were tanned for clothing, and to secure fish and crabs and other edible products of the sea, together with sea shells for decorative or utilitarian purposes. The use of the tidelands by the Indians from time immemorial was indissolubly linked with and concomitant to the occupation of the shorelands.

Up to now, this case has involved the question of rights in and to the bed of the three-mile marginal belt of the ocean and nothing more. Rights in and to the bed of the sea do not follow from the possession of fishing and boating rights. Cf. *United States* v. *California*, 332 U. S. 19, 37–38; *Toomer* v. *Witsell*, No. 415, this Term, and *Takahashi* v. *Fish and Game Commission*, No. 533, this Term, both now pending before this Court for decision. So that even if it be assumed that the

petitioners' predecessors did sail boats over the area involved in this proceeding, and did engage in the catching of seals and fish and other sea food, and, further, that petitioners are today possessed of the same rights, it is a far cry to suggest that petitioners therefore own the submerged lands.

The petitioners state that the aboriginal rights their ancestors had in the ocean adjacent to California were derived from, and were concomitants of, their right to the uplands. A claim to rights in the sea thus derived must fail if the petitioners are not, in fact, possessed of upland rights. That being so, a complete answer to petitioners' present claim is that their rights to the uplands were extinguished by their ancestors' failure to assert such rights in accordance with the provisions of the Act of March 3, 1851, 9 Stat. 631, creating a Board of Land Commissioners to ascertain and settle land claims in California. This act applied to all lands in California, and it has been held that the failure of Indians claiming lands in California under an alleged right of occupancy to present their claims and obtain a confirmation thereof under the procedure provided in the act results in an abandonment of those claims. *Barker* v. *Harvey,* 181 U. S. 481, 490; *United States* v. *Title Ins. Co.,* 265 U. S. 472, 482–484. See also *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 350.

C. *The petitioners have failed to assert their*

rights, if any, in the manner provided by Congress.—Petitioners assert (Motion, p. 4) that they are "the owners in fee simple, and claim all the right, title and interest in and to substantial portions of the lands" involved in this proceeding and, as above indicated, that their claims are paramount to those of both of the original parties. This would seem clearly to be an attempt to assert rights *in rem* in respect to the lands in question.

But it has been the general policy of Congress, in the enactment of special jurisdictional acts permitting Indian tribes and bands to sue the United States on claims arising out of alleged rights in lands, to limit the recovery allowable against the United States to money judgments. Indeed, we know of no instance in which the Congress has consented to the assertion by an Indian tribe or band of a right *in rem* against the United States. The present policy of the Congress in this regard is set forth in the Act of August 13, 1946, 60 Stat. 1049, creating the Indian Claims Commission. It would seem that the claims of petitioners arising out of the rights, if any, which they may have had in the lands involved in this proceeding should not be considered in this proceeding but should be presented to the forum provided by Congress for the consideration of such claims.

Moreover, litigation in which petitioners might have asserted any possible money claims in respect to the lands involved in this suit was only

recently concluded in the Court of Claims. By the Jurisdictional Act of May 18, 1928, 45 Stat. 602, the Indians of California, defined in the act as "all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State" were authorized to assert, in a suit in the Court of Claims, "all claims of whatsoever nature the Indians of California as defined in section 1 of this Act may have against the United States by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in said State which the United States appropriated to its own purposes without the consent of said Indians * * *." Pursuant to this Act, a suit instituted on behalf of the Indians by their designated counsel, the Attorney General of California, resulted in a recovery for the plaintiffs. *The Indians of California* v. *United States,* 98 C. Cls. 583, certiorari denied, 319 U. S. 764. A final judgment in favor of the Indians was rendered in the Court of Claims on December 4, 1944 (102 C. Cls. 837). Since the Jurisdictional Act embraced all claims of whatsoever nature of all Indians of California arising out of lands claimed by the Indians within the State, it would seem that the failure to include a claim for the lands involved in this proceeding would constitute a bar to the presentation of any such claim in the present proceeding.

D. *Petitioners do not meet the procedural requirements for intervention.*—Petitioners request (Motion, p. 6) that they be permitted to intervene in this proceeding under Rule 24 (a) of the Federal Rules of Civil Procedure.[2] It is the position of the United States that the petitioners have not, by the documents filed herein, demonstrated a compliance with the requirements of either Rule 24 (a), which deals with the matter of Intervention of Right, or Rule 24 (b), which relates to Permissive Intervention. Because we believe that petitioners' motion to intervene must be denied on this ground alone, we have treated only briefly with the more difficult jurisdictional problem (*supra,* pp. 3–6), and some of the more complex, though no less meritorious, objections to the petitioners' substantive claims (*supra,* pp. 6–9).

In both Rule 24 (a) and Rule 24 (b) it is provided, as a prerequisite to intervention, that an application therefor shall be "timely." It can hardly be contended that petitioners' application meets the condition. This proceeding was instituted in this Court in October 1945. Oral argument was held in March 1947 and the decision of the Court was rendered on June 23, 1947, followed by a decree entered October 27, 1947, 332 U. S. 804. The cause remains before the Court at this

[2] The Federal Rules are not necessarily controlling here, but they do furnish a sound guide to be followed in the absence of rules to the contrary.

time under a reservation of jurisdiction for the purpose of entering such further orders as may be necessary to give full force and effect to that decree. Now, approximately six months subsequent to the entry of the decree, petitioners seek to intervene and inject into the proceeding issues arising out of alleged claims adverse to those of both of the original parties to the suit. Bearing in mind that "intervention will not be allowed for the purpose of impeaching a decree already made" (*United States* v. *California Canneries,* 279 U. S. 553, 556), it is submitted that petitioners' application is not "timely" as required by Rule 24.[3]

It may also be mentioned that there is no statute of the United States conferring upon these

[3] Petitioners cannot be heard to say (Motion, p. 4) that they had no notice of the issue presented in this cause until after argument and decision in 1947. The question as to respective rights of the United States and the State of California in the three-mile belt of the Pacific Ocean was the subject of Congressional hearings and debate, and of administrative consideration, for a period of approximately eight years prior to the institution of this suit. See Hearings on S. J. Res. 208, 75th Congress, 3d Session, and S. J. Res. 83 and S. J. Res. 92, 76th Congress, 1st Session. Indeed, as early as 1937, administrative action on numerous claims to the area was suspended pending a judicial determination of the question as to the ownership of the underlying land. See Hearings on S. J. Res. 48 and H. J. Res. 225, 79th Congress, 2d Session, p. 5. As hereinabove indicated (pp. 8–9), from some years prior to 1937 until 1944 petitioners, through their duly designated attorneys, were prosecuting claims against the United States in the Court of Claims.

petitioners either a conditional or an unconditional right to intervene; and the questions as to whether the representation of their interest by existing parties is or may be inadequate, or whether petitioners may be bound by a judgment in the proceeding, need not be considered, since, as hereinabove stated, petitioners do not even suggest that their claims coincide, in whole or in part, with those of either of the original parties. The fact already noted (*supra*, pp. 6–7), that there is no inconsistency whatever between the paramount right of the United States in the submerged lands and any fishing and boating rights in the sea to which petitioners might be entitled, eliminates the possibility that they will be adversely affected by the disposition of property in the custody, or subject to the control or disposition, of the court. For this same reason, it seems clear that petitioners' claims and the main action do not have questions of law and fact in common.

Finally it is believed that the Court should consider the fact that intervention by petitioners, if granted, would unduly burden the subsequent conduct of this proceeding. The issue they desire to inject into the suit, namely the question as to the rights of petitioners to the lands here involved as against both the United States and the State of California, based on the theory of alleged aboriginal occupany, would greatly enlarge the issues as framed by the original parties. This is a result not permitted by the principles applicable to in-

tervention. *Chandler Co.* v. *Brandtjen, Inc.*, 296 U. S. 53, 58. In any event, the injection of this issue at this stage of the litigation would unduly delay and prejudice the adjudication of the rights of the original parties yet to be determined in the proceeding. Under these circumstances the Court should, under Rule 24, refuse the application for intervention.

CONCLUSION

The motion for leave to intervene, the petition for intervention, and the motion for injunction and the appointment of receiver should be denied.

Respectfully submitted.

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